88-1900

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. . . . . , Misc.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANDREA DWORKIN,

Petitioner,

v.

HUSTLER MAGAZINE, INC., a California corporation; LARRY FLYNT, a citizen of California; FLYNT DISTRIBUTING COMPANY, INC., a California corporation;

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

Petitioner, a lesbian and a public figure, seeks review of her right to protection of her private life where the publications involve no protected public purpose and are, on their faces, malicious. The questions presented are:

1. Does the First Amendment provide protection to every publication, no matter how grossly vile or vituperative, despite the fact that no constitutionally protected public purpose is involved so long as it is *labeled* "opinion"?

— what are the tests to identify constitutionally protected opinion in face of inconsistent tests among the circuits?

— did the lower court err in holding the materials published by *Hustler* were opinion and, therefore, constitutionally protected?

2. Where the publication is false, where no constitutionally protected purpose is involved, and where enmity is clear from the face of the publication, may malice sufficient to satisfy *New*

York Times v. Sullivan, 376 U.S. 254 (1964), be inferred from the publication itself?

3. Should proof of actual malice be required when a public figure has been defamed concerning private matters when there is no constitutionally protected purpose involved in the publication?

4. Is the petitioner entitled to her cause of action for invasion of privacy under New York law?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Andrea Dworkin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on January 24, 1989.

I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reproduced and attached in full as Appendix A.

II.
JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed January 24, 1989. No petition for rehearing or other proceedings were instituted. This Petition for a Writ of Certiorari is filed within ninety (90) days of January 24, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

III.
CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are the First Amendment and the Fourteenth Amendment to the United States Constitution.

IV.
STATEMENT OF THE CASE

The claims of Andrea Dworkin arose out of three separate publications of and concerning her in *Hustler* Magazine. The first and third of these, which appeared in the February, 1984, and December, 1984, *Hustler* Magazines, are reproduced and made part of this Petition as Appendix B and Appendix C. The second publication, from the March, 1984, issue of *Hustler*, is too lengthy to reproduce in full in this Petition but one copy is attached as required.

The first publication in the February, 1984, *Hustler* depicts two ugly, very fat lesbians engaged in an act of oral sex. It bears the caption "You remind me so much of Andrea Dworkin, Edna. It's a dog-eat-dog world." Fluids, salivary, vaginal, or both, drip from the mouth of the speaker as she gazes up from between the legs of the other woman.

The second offending publication, in the March, 1984, *Hustler*, is a so-called fantasy of Al

Goldstein titled "So Many Dykes, So Little Time." In a ten-page series of pictures, with cartoon-like balloon captions, Goldstein supposedly directs a bloody, ugly street orgy of lesbians. On the fourth page of this series, the caption appears: "While I'm teaching this little shiksa the joys of Yiddish, the Andrea Dworkin Fan Club begins some really *serious* suck 'n' squat. Ready to give up the holy wafers for matzoh yet, guys?" Later in the series, a Gloria Steinem look-alike, referred to as "Field Marshal Steinem," appears and is brutally raped.

The third publication, which appeared in the December, 1984, *Hustler,* was titled "Porn from the Past." It shows a man performing oral sex on an obese woman while masturbating. A portion of the text under the photograph says: "We don't believe it for a minute, but one of our editors swears that this woman in the throes of ecstasy is the mother of radical feminist Andrea Dworkin."

The vile nature of these publications against Petitioner, who has been at the forefront of a

national campaign against pornography, on their faces were published for no other purpose except to injure her, and on their faces were published with a reckless disregard for the truth.

These "works" were published and distributed by Larry Flynt and *Hustler Magazine* with the intent to harm Andrea Dworkin. Flynt testified at his deposition that "I just think it is really funny that all of these women that are against pornography are somebody that nobody would want to fuck anyway." Flynt also testified that if a woman fought pornography, she would come to his attention and agreed that this was one of the reasons he published these materials about Andrea Dworkin.

The cartoon (Appendix B) was clearly an intentional attack on Andrea Dworkin by Larry Flynt. The cartoonist who drew it, John Billette, testified that he had *completed* the work with a different caption, one which did not mention Andrea Dworkin. Billette submitted the cartoon to

a *Hustler* editor, Dwayne Tinsley, who took it to Flynt. The cartoon was returned to Tinsley from Flynt with Andrea Dworkin's name added.

And Lonn Friend, a *Hustler* editor, testified that, with respect to the "Porn from the Past" (Appendix C), "Andrea Dworkin's name would never have come up in this copy if this person in this old picture didn't slightly resemble her."

One need only look at the publications themselves to conclude that there was *no public purpose served*, but that they were, instead, a month-by-month campaign undertaken by Flynt, who possessed the power of the press and who believed himself immune to redress, to do intentional injury to Ms. Dworkin.

This case was originally filed in the State Court in Teton County, Wyoming. Andrea Dworkin made claims for libel, invasion of privacy, intentional infliction of emotional injury, and other

claims[1] which were, ultimately, not before the United States Court of Appeals for the Ninth Circuit on appeal. The case was removed by the defendants to the United States District Court for the District of Wyoming. Eventually, it was transferred to the United States District Court for the Central District of California. The trial court there dismissed the claims in their entirety, and an appeal was taken to the United States Court of Appeals for the Ninth Circuit. The appeals court upheld the dismissal.

The Ninth Circuit ruled that the publications were not libelous because they were protected *opinion* and, further, there had been insufficient evidence of actual malice as those words are

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[1] Faced with the obvious extremely difficult hurdles in defamation claims, Andrea Dworkin also attempted to make out claims under the Federal R.I.C.O. statutes and under obscenity statutes. These were rejected by the trial court in Wyoming. The claim that she should have a private cause of action for obscenities published about her was also later rejected by the United States Court of Appeals for the Ninth Circuit - Opinion, Appendix A, p. 546.

defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964) The court ruled that either ground was sufficient to justify the dismissal of Dworkin's claims and precluded any inquiry into the obvious harm done to Dworkin.[2]

Dworkin seeks review of the decision of the United States Court of Appeals for the Ninth Circuit. Petitioner, a lesbian and a public figure, asks that she be protected in her private life from these publications that involve no protected public purpose and that are, on their faces, malicious.

V.
REASONS FOR GRANTING THE WRIT

The Ninth Circuit illustrates the extent to which the concepts of *Gertz v. Welch*, 418 U.S. 323

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[2]The United States Court of Appeals for the Ninth Circuit also observed and held that the same considerations applied to the invasion of privacy and intentional infliction of emotional harm claims. "If upheld, either of these conclusions would also dispose of Dworkin's intentional infliction of emotional distress and false light privacy claims." Opinion, Appendix A, p. 534.

(1974), *New York Times v. Sullivan, supra,* and *Hustler Magazine Inc., v. Falwell,* 108 S.Ct. 876 (1988), have been extended to permit wholesale, unfettered attacks of the vilest nature imaginable on citizens. As a matter of public policy, a review by the United States Supreme Court is necessary to keep within conscionable bounds the blanket protection granted all publishers and to protect citizens from serious injury against which they currently have no protection.

This Court has recently denied pleas for review by two other citizens who had engaged in the fight against pornography and who were also assaulted by *Hustler* (*Ault v. Hustler Magazine, Inc.*, et. al., 109 S.Ct. 1532 (1989), and *Leidholdt v. L.F.P., Inc., et al.*, 109 S. Ct. 1532 (1989).) Both Peggy Ault and Dorchen Leidholdt were told by the Ninth Circuit that such publications were constitutionally protected and that they had no recourse for their obvious injuries. Yet a qualitative difference in those cases and

Petitioner's exists: The *Ault* and *Leidholdt* cases were based on so-called "editorials," the "Asshole of the Month" column, while Petitoner's case involves the most wretched and humiliating form of cartoon, writing and photograph.

Unlike the *Ault* and *Leidholdt* cases, Andrea Dworkin asks this Court to clarify the law in such extreme cases as this where the *motive for the publication, on its face, is to do serious injury and where no constitutionally protected public purpose* is involved, so that the age-old rule of justice, "where there is a wrong there is a remedy," may be given rebirth. This petition is presented in the humble belief that in a rational system of justice there must be some small niche in the plethora of semantic protections which have been erected around publishers that will permit redress for a citizen who has been intentionally and viciously injured for no justifiable public reason; that is to say, surely in a just society a citizen's name and reputation merit at least

minimal protection against maximum malice. Under the present law, the maze of device and technicalities through which an injured citizen must weave his or her claim for libel or for invasion of privacy makes any remedy for injury in such cases as these—where the offense has been the most blatant—for all practical purposes nonexistent.

Ms. Dworkin seeks this Court's review of her case from two perspectives: *First*, that first amendment protection has become so expansive that under the most obvious pretensions of *opinion* and under an extremely compressed and technical view of *malice*, as defined in *New York Times v. Sullivan, supra,* publishers possess license to injure citizens at will *where no constitutionally protected public purpose* is at stake; and, *second,* that if, indeed, such blanket protection exists, as Petitioner asserts, then Petitioner plainly prays that the Court redefine the existing parameters or so clarify them that citizens may again enjoy at

least minimal protections from maximal intentional assaults in cases in which *no constitutionally protected public purpose is at stake*.

1. **ESCAPE BY OPINION**

It is difficult to conceive of a larger or more devastating line of cases which have sprung from the *dicta* of this Court than those generated by the observation in *Gertz v. Welch, supra*, at 418 U.S. 339, that "there is no such thing as a false idea." It is from this seemingly innocent truth that an entire body of complex, semantically impossible rules have developed which, with rare exception, are relied upon by courts across the land to deny recourse to innocent persons who have been defamed.

The insidious nature of the "opinion" defense is that it is so all-encompassing. Characterization of a publication—be it a few words, a lengthy diatribe, a picture, or a cartoon—as "opinion" automatically provides blanket protection to the

publication without reference to its injurious effect on the person damaged and without regard as to whether a *constitutionally protected public purpose* is at stake. Thus, Andrea Dworkin, or anyone else, will be denied justice by the simple device of labeling an assault "opinion," without regard to whether the obvious meaning and inferences to be drawn from the cartoons, pictures, and words are false, defamatory, injurious or unjustly invade the injured person's privacy.

What is and what is not opinion is nearly impossible to determine considering the massive overburden of semantic rubble through which one must sort to arrive at such a decision, and all but the most profound legal minds remain baffled, and even they are not in accord. A review of the test for "opinion" in the United States Court of Appeals for the Second Circuit is illustrative of this. According to the decision in *Mr. Chow of New York*

v. Ste. Jour Azur S.A., 759 F.2d 219, at 226, (2d Cir. 1985), the test for determining an opinion is:

> 1. Examine both the context in which the statements are made and the circumstances surrounding the statements.
> 2. Examine the language to see if it is used in a precise, literal manner or in a loose, figurative or hyperbolic sense.
> 3. Examine the statements to see if they are objectively capable of being proved true or false. If so, they are not opinion.
> 4. Even if the analysis in 1-3 indicates the statement is opinion, if it implies the allegation of undisclosed defamatory facts as the basis for the opinion, then it is still actionable.

The test for opinion in the Ninth Circuit is different but similarly obtuse, as the following summary of *Lewis v. Time, Incorporated,* 710 F.2d 549, 553 (9th Cir. 1983), *Church of Scientology v. Flynn,* 744 F.2d 694 (9th Cir. 1984), *Yagman v. Baden,* 796 F.2d 1165 (9th Cir. 1986), and *Koch v. Goldway,* 817 F.2d 507 (9th Cir. 1987) demonstrates:

> 1. The words alone are not determinative. The overall context of the publication may be

considered to determine whether the words could be understood in a defamatory context.

2. Words uttered in public debate, heated labor dispute, or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their position by the use of epithets, fiery rhetoric or hyperbole may be considered as opinion.

3. Are the words couched in "terms of apparency"?

Andrea Dworkin argued to the Ninth Circuit that, applying either of the above two tests, the inferences drawn from the *Hustler* publications about her were not protected opinion. She stressed that the publications falsely implied that she would engage in the type of sexual activity portrayed by the cartoon, or that she would make her sexuality available for public view and ridicule. She pointed out that the cartoon falsely portrayed her sexuality as something very ugly, indeed.

Petitioner argued that "So Many Dykes, So Little Time" falsely suggested that she or her followers would freely engage in lesbian activities in the street, for public view, and would also

engage in violent sexual acts against each other. She asserted that the publication falsely transformed her into what she opposes the most—*pornography*. She also argued that "Porn from the Past" falsely inferred that she was the daughter of a whore who would publicly engage in the acts depicted.

Ms. Dworkin did her best to negotiate the many semantic hurdles thrown in front of her and to pierce the transparent and eternally elastic shield that stretches and stretches, as required, under the guise of opinion to preclude the citizen from redress. She emphasized that under New York law, the law of her domicile, opinion is given only *limited* protection, *Silsdorf v. Levine*, 462 N.Y.S.2d 822, 59 N.Y.2d 8, 449 N.E.2d 716 (1983), and she asked, and continues to ask, *what is the opinion expressed* in these cruel assaults on her? *And what is the constitutionally protected public interest* in the assertions of these vile materials?

Petitioner argued these assaults were not "couched in terms of *apparency*," which they obviously weren't. She pointed out that the ugly inferences of the publications, such as the public availability of her sexuality, were objectively provable as false, and could therefore not be considered as an "opinion." She made it clear that the cartoon made it seem that *Hustler* was privy to undisclosed facts about her private sexuality, which *Hustler* was not, and that this, too, removed the publication from the realm of opinion.

But the Ninth Circuit [3] dismissed these as well as other assertions by Petitioner to the effect that the attacks were not opinion. The appearance of these vile and ruthless assaults in a

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[3] The United States Court of Appeals for the Ninth Circuit also observed and held that the same considerations applied to the invasion of privacy and intentional infliction of emotional harm claims. "If upheld, either of these conclusions would also dispose of Dworkin's intentional infliction of emotional distress and false light privacy claims." Opinion, Appendix A, p. 534.

pornographic publication, according to the court, "robs the statements of defamatory meaning,"[4] rationalizing its conclusion that the publications were opinion by claiming that "[l]udicrous statements are much less insidious and debilitating than falsities that bear the ring of truth. We have little doubt that the outrageous and the outlandish will be recognized for what they are,"[5] which is to offer the small comfort that the more defamatory the statement, the more protection it is given.

Petitioner asks the Court to recognize how words originally meant to do justice are being conscripted with a nearly religious fervor to deprive citizens of *any* right to protect their good names and reputations. The assaults made against Petitioner were deliberate and vindictive and had no other purpose than to injure and thereby to *punish her for the exercise of her own first*

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[4]Opinion, Appendix A, p. 535.
[5]Opinion, Appendix A, p. 536.

amendment rights in her fight against pornography. Surely the wondrous ideal that "there can be no such thing as a false idea" was never intended to give license to injure innocent people by subjecting them, without recourse, to the will of any publisher, and if this be true, then this Court should reestablish the guidelines as to what is protected opinion and what is not, or the Court should, assuming present law provides adequate protection, reverse for the Circuit's misapplication of the same.

2. **ACTUAL MALICE**

In her complaint Andrea Dworkin admitted she was a public figure which required, of course, that she prove "actual malice." Different than *Hustler v. Falwell, supra,* no casual observer could determine the truth or falsity of these publications on their faces, but serious obvious implications and inferences of falsity would be apparent to any publisher about to print materials showing a plaintiff engaging in cunnilingus, cavorting in

obscene lesbian street orgies, and in a photo holding plaintiff out as the daughter of a whore. The publication of this false material without inquiry, without concern for the grossly injurious nature of the same, was patently reckless, even under *New York Times v. Sullivan.* The question then is, where there is a false publication, where *no constitutionally protected public purpose is involved*, and where enmity is clear from the face of the publication, may malice sufficient to satisfy *New York Times v. Sullivan* be supplied from the publication itself?

Contrary to the assertions of the Ninth Circuit, the difference between "*New York Times* malice" and the lay meaning of malice has not "eluded" Petitioner or her counsel.[6] Yes, of course, we are all guided by the *New York Times* definition of "actual malice." But it is an aberrant child of logic that insists an injured party may

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[6]Opinion, Appendix A, p. 538.

recover for what amounts to the constructive malice of *New York Times* (arising from proof that the defendant knew or was reckless in not knowing that the published material was false) but where *real malice* (pure enmity) is evident on the face of a false publication, the *real malice* is not sufficient under the law to provide recovery. That is to say, only constructive maliceonly judge-made malice and not the malice of hatred and vindictivenesswill provide the necessary proof for recovery.

The notion that malice may arise from the excessiveness of the publication itself is nothing new in the law. It is recognized in Petitioner's domicile, New York, where the court observed, "There may be circumstances in which a communication may be so extravagant in its denunciations or so vituperative in its character as to justify an inference of malice." *Kasachkoff v. the City of New York,* 485 N.Y.S.2d 992, 107 A.D.2nd 130 (1985). The case acknowledged the

rule, a restatement of a concept recognized earlier in *Ashcroft v. Hammond*, 197 NY488, 90 N.E. 1117 (1910), although the case was not decided on this proposition).

The Ninth Circuit simply ignored Petitioner's proof of reasonable inferences of actual malice arising from these publications. Flynt had singled out Petitioner for an attack. She was a national leader in the fight against pornography, and Flynt had assaulted her in continuous attacks. Moreover, as we have seen, Flynt himself altered the work of a cartoonist to make the cartoon a deliberate, personal, by-name attack on Petitioner.

But what Andrea Dworkin could not do, of course, was clear the hurdle of presenting *direct* evidence that Flynt or others at *Hustler* knew that the statements about her were false. Such proof is impossible in cases such as ours, since Flynt, a sophisticated pornographer with vast experience in the courts, would never admit such knowledge, and, further, the tactical position of *Hustler* in all

such cases is to claim the publications are opinion, parody, or fiction, which means there were *no statements of fact,* that is to argue, how could a nonexistent statement of fact be false?

By simply asserting that a publication is opinion, those in the business of defamation achieve almost total immunity under the Constitution, and at the very least, by hanging their publication on the opinion-peg, they insulate themselves from the risk of admitting to a false statement of fact, because, theoretically, opinion is opinion, not fact.

To demonstrate actual malice then, a plaintiff such as Petitioner is left with only her reasonable inferences that the publication was made with knowledge of its falsity or with a reckless disregard thereof. The Second Circuit recognizes such inferential proof of actual malice. In *Dalbec v. Gentlemen's Companion, Inc.*, 828 F.2d 927 (2d Cir. 1987), that court observed "[M]alice may be proved inferentially because it is

a matter of the defendant's subjective mental state, revolves around facts usually within the defendant's knowledge and control, and rarely is admitted." In this case the inference of malice seems too clear to argue. Yet these malicious-on-their-face materials were deemed not actionable by the United States Court of Appeals for the Ninth Circuit because the Petitioner had not proven the constructive malice of *New York Times v. Sullivan, supra.*

3. **MALICE IN THE PUBLIC FIGURE-PRIVATE FACTS CASE**

Although Ms. Dworkin is, admittedly, a public figure, *Hustler's* assault invades the most private aspects of her life where no constitutionally public purpose is at stake. Though she acknowledges she is a lesbian, her sexuality is obviously private. She has never made a public display of her sexuality, nor, for that matter, has her mother.

Hustler's infamous publications put on public display Petitioner's private sexuality—and falsely so at that. In cases in which no *constitutionally protected public interest* is involved, this Court should provide at least minimum protection for public figures from injury by false publications concerning their private lives, especially in those cases in which an escape from liability is sought though the device of opinion.

The recognition of standard rules that have long permitted reasonable inferences to arise from the publication itself would bring libel actions back into the jurisprudential fold and dissuade the bench and bar of the prevailing notion that an open season has been declared by the law on all public figures whose lives, by judicial fiat, have become open books to be trampled on, and, worse, to be rewritten, scorned and lied about, and, worse, at the whim of anyone who cares to call himself a publisher.

This Court has ruled in three of four possible situations involving private figure versus public figure on the one hand and private issue versus public issue on the other. The following rules seem clear:

1. A private person defamed on a matter of private concern need not show malice. (*Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749 (1985).)

2. A private person defamed on an matter of public concern must show fault, or negligence, but not actual malice, except to get punitive damages. (*Gertz v. Welch, supra.*)

3. A public person defamed on a matter of public concern must show actual malice. (*New York Times v. Sullivan, supra*, and its progeny.)

4. Specific parameters for a *public person defamed on matters not of public concern have not been established.* It is in this context your Petitioner requests review of her case. In such a case, actual malice should not be required.

None of Flynt's three publications concerning Andrea Dworkin make comment on any matter of public concern. Contrary to the pure invention of the Ninth Circuit, the publications do not comment even on the conflict between Flynt, the pornographer, and Dworkin, the opponent of pornography. The publications are utterly silent concerning any issue, public or otherwise, except the issue of Flynt's hatred of Petitioner and his intent to do her injury under a state of the law that leaves Petitioner without redress.

Correctly, the Ninth Circuit did observe that the debate between pornographers and opponents of pornography is a matter of public concern—but the court disappointed us when it failed to even hint in what manner these vicious attacks on Andrea Dworkin served to editorialize or comment on such issues. Instead, the court incorrectly and unjustly extended the scope of *Hustler Magazine Inc., v. Falwell, supra,* to cover this case as well.

In error, the Ninth Circuit read *Falwell* for the proposition that a public figure must demonstrate *New York Times v. Sullivan* malice in a case concerning the private life of the plaintiff. But *Falwell* was predicated on a jury finding that *no statements of fact* were made about the Rev. Falwell, or, for that matter, his mother. In Petitioner's case, no such finding exists. Petitioner asserts that proof of actual malice should not be required where a public figure has been defamed concerning private matters when there is no constitutionally protected purpose involved in the publication. This petition raises that important issue.

4. INVASION OF PRIVACY

The decision of the Ninth Circuit was predicated on a *literal* interpretation of New York's invasion of privacy statute, Civil Rights Law Section 51. Such an interpretation limits recoveries for invasion of privacy to cases in which the plaintiff's image is used "for purposes of

trade." However, the case law in New York indicates the willingness of New York courts to give a much broader interpretation to this cause of action. Under New York law, Andrea Dworkin should prevail.

Davis v. High Society Magazine, 457 N.Y.S.2d 308, 90 A.D.2d 374 (1982), and *Marcinkus v. NAL Publishing, Inc.*, 522 N.Y.S.2d 1009 (1988), demonstrate the breadth of the "purpose of trade" requirement of New York's privacy statute. *Davis* involved the use of a photograph of a person who closely resembled the plaintiff. *Marcinkus* concerned a fictional work about Archbishop Paul Marcinkus in which the fictional character bore many resemblances to the real person and, in the story, conceived a plan to assassinate a Soviet Premier. Both cases established that a falsehood, a fictionalization, about an individual can be the basis for a claim in New York for violation of the privacy statute cited above.

According to the *Davis* court, "a finding that a publication was for the purposes of trade may be predicated on either *the lack of a reasonable connection between the use and a matter of public interest, or on a finding that the use contained substantial fictionalization or falsification.*" *Davis v. High Society Magazine, Inc., supra,* citing *Pagan v. New York Herald Tribune,* 32 A.D.2d 341, 301 N.Y.S.2nd 120, Aff'd., 26 NY2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727. (Emphasis added.) In *Marcinkus,* the court declared that "*[A] knowing fictionalization, and surely an entire work of fiction, is actionable under Section 51, even under the standards of New York Times v. Sullivan and Time v. Hill, supra.*" (Emphasis added.)

Petitioner asserts that the substantial fictionalization of her name and image (and *Hustler* admits it did just that) forms the basis of a claim for invasion of privacy in New York. If the images of Andrea Dworkin portrayed in these three publications about her do not make

statements of fact about her, then she is still entitled to recover for the false inferences about her brought on by the substantial fictionalization undertaken by *Hustler*. We ask the Court to recognize this right and to define the parameters of her recovery under New York law.

VI.
CONCLUSION

We seek the return to long established rules of law, and the clarification of existing law and, in the furtherance of justice, we seek, if necessary, the enunciation by this Court of new standards of law to give life to old remedies. For the reasons stated above, Andrea Dworkin, your Petitioner, requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANDREA DWORKIN; PRISCILLA MOREE; JUDITH FOUTS,
Plaintiffs-Appellants,

v.

HUSTLER MAGAZINE INC., et al.,
Defendant-Appellee.

No. 87-6393

D.C. No. CV-86-7786-AWT

OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
August 5, 1988—Pasadena, California

Filed January 24, 1989

Before: Cynthia Holcomb Hall and Edward Leavy, Circuit Judges, and Philip M. Pro,* District Judge.

Opinion by Judge Hall

SUMMARY

Torts/Constitutional Law

Affirming a judgment, the court held that a pornographic periodical's derogatory use of a public figure's name did not support a cause of action for libel.

*Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

Prominent feminist appellant Andrea Dworkin is a public figure. Appellee Hustler Magazine is a pornographic periodical. Dworkin and appellants Judith Fouts and Priscilla Moree sued various Hustler defendants for libel, invasion of privacy, intentional infliction of emotional injury, "outrage," and joint and several liability. Dworkin also sued for deprivation of her constitutional rights. The suit stems from published features in Hustler Magazine where Dworkin's name was used in a derogatory fashion.

[1] The district court granted summary judgment on Dworkin's libel claims on two independent grounds. If either is upheld, it would also dispose of Dworkin's intentional infliction of emotional distress and false light privacy claims. **[2]** As to the fact-opinion distinction, from the facts surrounding the publication, the context in which the statements were made, and the appearance of the language in a pornographic magazine robs the statements of defamatory meaning. Accordingly, Hustler's statements are privileged opinions. **[3]** Dworkin also failed to introduce evidence of *New York Times* malice as an alternate ground for summary judgment. **[4]** Dworkin persisted in using the term "malice" in its colloquial sense of "spite" or "ill-will." **[5]** Further, vehement, and even "outrageous," criticism of public figures is a component of the robust political debate encouraged by the first amendment. **[6]** Accordingly, Dworkin's claims are squarely within the rule of *New York Times*. She has failed to show such malice. **[7]** Defamatory statements of untrue fact contained in private figure/private concern speech are unprotected by the first amendment. **[8]** Dworkin asks this court to extend this principle to public figure/private concern cases. This request, however, rests on analytically faulty reasoning. **[9]** New York law governed Dworkin's state law claims, including her invasion of privacy claims. Its statute was drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. **[10]** Dworkin cannot plausibly argue that the cartoons constitute an appropriation by Hustler of the commercial benefit of a performance in which Dworkin has

a proprietary interest or that the cartoons indicate her endorsement of Hustler. Therefore, she can not recover on any privacy theory recognized by New York. [11] As to appellants' claim of an implied private cause of action based on a Wyoming criminal obscenity statute, [12] under the three-part test for obscenity, the Features expressed opinions about matters of public concern, and as such, did not lack serious literary, artistic, political, or scientific value. It follows that they were not obscene. [13] The court also declined to create a new category of expressive activity — non-obscene pornography — that is not entitled to constitutional protection.

COUNSEL

Gary L. Schockey, Spence, Moriarity & Shuster, Jackson, Wyoming, for the plaintiffs-appellants.

David O. Carson, Cooper, Epstein & Hurewitz, Beverly Hills, California, for the defendants-appellees.

OPINION

HALL, Circuit Judge:

Andrea Dworkin is a prominent and outspoken feminist author and activist. She is a vocal advocate for the prohibition of pornography, and was one of the principal drafters of the ordinance against pornography enacted by the city of Indianapolis and struck down as unconstitutional. *See American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). By her own admission, she is a public figure in this case. Hustler Magazine is a pornographic periodical. Much of its content consists of what we have recently described as "disgusting and distasteful

abuse." *See Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 884 (9th Cir. 1988). It is frequently named as a defendant in lawsuits such as this. *See generally, e.g., Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 892 (9th Cir. 1988) (citing cases); *Ault*, 860 F.2d at 877.

Predictably, Dworkin's beliefs and Hustler's editorial viewpoint are inimical to one another, and each party regards the other with hostility. In February, March, and December of 1984, Hustler published features mentioning Dworkin's name in a derogatory fashion. These features (the "Features") are the basis for the claims asserted in this case.

The February Feature is a cartoon, which, as described in the plaintiffs' complaint, "depicts two women engaged in a lesbian act of oral sex with the caption, 'You remind me so much of Andrea Dworkin, Edna. It's a dog-eat-dog world.' " The March Feature is a ten page pictorial consisting of photographs of women engaged in, among other things, acts of Lesbianism or masturbation. Some of the photographs depict obviously staged scenes that include posed violence and phony blood. One photograph, supposedly of a Jewish male, has a caption stating: "While I'm teaching this little shiksa the joys of Yiddish, the Andrea Dworkin Fan Club begins some really *serious* suck-'n'-squat. Ready to give up the holy wafers for matzoh, yet, guys?" The December Feature was included in the "Porn from the Past" section of the magazine. It shows a man performing oral sex on an obese woman while he masturbates. A portion of the caption states: "We don't believe it for a minute, but one of our editors swears that this woman in the throes of ecstacy is the mother of radical feminist Andrea Dworkin."

Dworkin originally filed her complaint in Wyoming state court. With her as plaintiffs were Judith Fouts and Priscilla Moree, in their individual capacities and, respectively, as representatives of the Wyoming and the Jackson, Wyoming Chapters of the National Organization for Women ("NOW").

Fouts and Moree are also appellants here. The complaint named as defendants Hustler, Larry Flynt (Hustler's publisher), Inland Empire Periodicals, and Park Place Market. Appellants later amended their complaint to add as a defendant Flynt Distributing Company, Inc. (We will refer to Hustler, Flynt, and Flynt Distributing as the "Hustler defendants.") Inland Empire distributes Hustler in Wyoming and Park Place is a Wyoming retailer of the magazine. Moree, Fouts, Inland Empire, and Park Place are Wyoming citizens. The defendants filed a timely petition for removal to the District Court for the District of Wyoming, asserting both federal question and diversity jurisdiction. The removal petition asserted that all four Wyoming residents were fraudulently joined and should not be considered for purposes of determining diversity jurisdiction.

The Wyoming district court found "that removal was proper, based upon both federal question and diversity jurisdiction." *Dworkin v. Hustler Magazine, Inc.*, 611 F. Supp. 781, 788 (D. Wyo. 1985). "Although the [Wyoming district court was] not totally convinced that plaintiffs Moree and Fouts [were] properly joined in th[e] action," it did not disregard their claims in finding that diversity jurisdiction existed. *Id.* at 785. Instead, the Wyoming district court found that Park Place was fraudulently joined, ignored its presence, and therefore found complete diversity. *Id.* at 787 (the court did not discuss Inland Empire, an unexplained omission).

The complaint contains Dworkin's claims of libel, invasion of privacy, intentional infliction of emotional injury, "outrage," and joint and several liability, as well as a less typical civil rights claim that Hustler and Flynt deprived her of her constitutional rights. On these claims Dworkin seeks recovery of $50 million in actual damages and $100 million in punitive damages. Moree and Fouts claim that publication of the Features: "is tantamount to a direct assault upon the rights and interests" of Moree, Fouts, and the relevant chapters of NOW; "has caused actual damages" to those persons

and their associational rights, and causes irreparable harm to those persons; and "makes other women afraid to exercise [political freedoms on behalf of women] for fear of an ugly, pornographic representation of them appearing in such a magazine." Moree and Fouts seek pursuant to this claim damages in an unspecified amount and an injunction preventing Hustler "from using the name or likeness of any member of [the Wyoming or Jackson NOW] or any other woman in any article which is false, known to be false, or, if true, not published with good intent and for justifiable ends." Finally, all three plaintiffs seek recovery pursuant to an implied private cause of action based on a Wyoming criminal obscenity statute.

Inland Empire and Park Place filed a motion to dismiss for failure to state a claim upon which relief could be granted. The Hustler defendants filed a Rule 12(c) motion for judgment on the pleadings as to Dworkin's constitutional rights count, Moree and Fouts' count, and the obscenity count, also on the ground that the complaint failed to state a claim. The Wyoming district court granted both motions, dismissing the claims against Inland Empire and Park Place, and the three counts attacked by the Hustler defendants' Rule 12(c) motion. *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 731 (D. Wyo. 1986).

The Hustler defendants also sought a change of venue from the District of Wyoming to the Central District of California, which the Wyoming district court granted. *Dworkin v. Hustler Magazine, Inc.*, 647 F. Supp. 1278, 1283 (D. Wyo. 1986). Prior to the change of venue, the Hustler defendants had filed a motion for summary judgment. This motion had been fully briefed, but was still pending at the time of the transfer. The California district court subsequently granted the motion in a Memorandum Opinion and Order and entered judgment in defendants' favor on all remaining claims. *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408 (C.D. Cal. 1987).

Appellants filed a notice of appeal taking their appeal from a number of the district court's procedural and substantive rulings. In their brief, however, appellants have abandoned most of their grounds for appeal. At this stage, appellants no longer contest any of the procedural orders. Moreover, appellants no longer contest the dismissal of Inland Empire or Park Place.[1] Accordingly, the only matters before us relate to the substantive merits of the Rule 12(c) dismissal and the summary judgment in favor of the Hustler defendants. Two amicus briefs have been filed in support of appellants, one by Citizens for Decency Through Law, Inc., the other by Gloria Steinem and Susan Brownmiller. The amicus briefs also raise the merits of the district court's substantive decisions.

I

We review a summary judgment de novo. *E.g., Webb Co. v. First City Bank (In re Softalk Publishing Co.)*, 856 F.2d 1328, 1330 (9th Cir. 1988). We also review the district court's decision to grant the Hustler defendants' Rule 12(c) motion de novo. The principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of filing. Because the motions are functionally identical, the same standard of review applicable to a Rule 12(b) motion applies to its Rule 12(c) analog. In this case, the Hustler defendants' Rule 12(c) motion was equivalent to a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, and de novo review is therefore appropriate. *See, e.g., Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 693 (9th Cir. 1988) (observing that dismissal "for failure to state a claim upon which relief could be granted" is reviewed de novo, without mentioning Rule 12(b)(6)).

[1]The district court held that the Wyoming defendants were improperly joined and should not be considered for diversity purposes. *See, e.g., Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939). We construe appellants' failure to contest this point as acquiescence in the district court's decision, which we do not disturb.

II

[1] The district court granted summary judgment on Dworkin's libel claims on two independent grounds. First, the court found that the Features could not reasonably be understood as expressing statements of fact about Dworkin, and therefore could not provide a basis for defamation liability. Second, the court found that even if the Features did contain false statements of fact, Dworkin had presented no evidence of malice as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964) ("*New York Times* malice"), and therefore had failed to establish a genuine issue of material fact with respect to an issue on which she bore the burden of proof. If upheld, either of these conclusions would also dispose of Dworkin's intentional infliction of emotional distress[2] and false light privacy[3] claims.

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[2] *Leidholdt*, 860 F.2d at 893; *Ault*, 860 F.2d at 880; *see Falwell*, 108 S. Ct. at 882. The district court, which rendered its decision before the Supreme Court handed down *Falwell*, properly granted summary judgment on Dworkin's emotional distress claims on a different ground. The district court reasoned, "[w]hatever the label, Dworkin cannot maintain a separate cause of action for mental and emotional distress where the gravamen is defamation." *Dworkin*, 668 F. Supp. at 1420. As we recently noted, "[a]n emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action." *Leidholdt*, 860 F.2d at 893 n.4.

Although the complaint sets forth separate counts for emotional distress and outrage, appellants have not differentiated these claims before us or the district court. The district court correctly held that these counts assert the same claim. "[T]he tort of outrage is not separable from intentional infliction of emotional distress." *Id.* at 892 n.2.

[3] *Leidholdt*, 860 F.2d at 893; *Ault*, 860 F.2d at 880; *see Time, Inc. v. Hill*, 385 U.S. 374, 390, 394 (1967). Furthermore, as with the emotional distress claim, Dworkin's false light privacy claim is "sufficiently duplicative of libel" as to be subsumed within it. *Leidholdt*, 860 F.2d at 893 n. 4. In order to survive as a separate cause of action, a false light claim must allege a non-defamatory statement. If the statements alleged are defamatory, the claim would be for defamation only, not false light privacy. *See Time*, 385 U.S. at 390-91. In this case, Dworkin has strenuously argued that Hustler's state-

A

In our leading case on the fact-opinion distinction, *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987), we observed that "[s]tatements not themselves factual, and which do not suggest that a conclusion is being drawn from facts not disclosed in the statement, are commonly statements of opinion, not fact." *Id.* at 509. We have formulated a three-part test to guide our inquiry. *See Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983). The parties have also asked us to consider a Tenth Circuit case, which framed the question as "whether the [Features] could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated." *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

[2] This case does not require a close inquiry on our part. *Ault* and *Leidholdt* are squarely in point, and lead to the conclusion that the Features consist of privileged opinion. *Ault* and *Leidholdt* point out that *Koch* directs us to examine the facts surrounding the publication, the context in which the statements were made, and the nature of the language used. As was the case in *Ault*, "[w]e think it clear that there is a heated and spirited debate on pornography," the extreme language to which Dworkin objects is "representative of the type of language generated in a dispute over such a subject," and the appearance of the language in a magazine known for its pornographic content "robs the statements of defamatory meaning." *Ault*, 860 F.2d at 881. Accordingly, as in *Ault* and

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ments are defamatory. Consequently, she has failed to state a false light claim; the false light aspects of her privacy claim are subsumed in her libel claims.

Finally, we note that New York has explicitly refused to adopt or to reject the tort of false light invasion of privacy. *E.g. Arrington v. New York Times Co.*, 55 N.Y.2d 433, 437, 449 N.Y.S.2d 941, 945, 434 N.E.2d 1319, 1323 (1982). We hold that they would not adopt the tort in this case, either.

Leidholdt. Hustler's statements in this case are privileged opinion.

An examination of a Hustler feature filed by appellants and amici Steinem and Brownmiller helps to illustrate this point. The work is entitled, "Hustler Interview: Gloria Steinem's Clit." This work contains a number of statements that by their terms can be read as statements of fact. Nevertheless, the article purports to be an interview of a body part, and therefore cannot be reasonably understood as making assertions of fact. By the same token, such phrases as "pus bloated walking sphincter," "wacko," or "bizarre paranoia" were not reasonably understood as attributions of physical or mental disease to the plaintiff in *Leidholdt*. *See* 860 F.2d at 894. The statements about Dworkin contained in the Features are of the same ilk, and are not reasonably understood as statements of fact. Instead, they are privileged opinion.

Dworkin errs by limiting "opinion" to high-minded discourse. In this context, the word "opinion" is a label differentiating statements containing assertions of fact from those that do not. To differentiate among statements not of a factual nature would be at odds with fundamental principles of first amendment law, which seeks to facilitate the "search for truth" by encouraging "uninhibited, robust, and wide open" public debate, *New York Times*, 376 U.S. at 270, and is informed by the notion that "there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). We agree with counsel for Dworkin that this means that outrageous and outlandish statements are sometimes protected, but do not share their alarm over this prospect. *See Cohen v. California*, 403 U.S. 15, 25-26 (1971) (first amendment protects the emotive content and function of expression, which "may often be the more important element of the overall message sought to be communicated"). Ludicrous statements are much less insidious and debilitating than falsities that bear the ring of truth. We have little doubt that the outrageous and the outlandish will be recognized for what they are.

Dworkin's suggestion that this issue is unsuitable for summary judgment lacks merit. We have held that "the distinction between alleged fact or opinion is a question of federal law." *Leidholdt*, 860 F.2d at 893; *accord Iadt*, 860 F.2d at 880; *Koch*, 817 F.2d at 509; *see In re Yagman (Brown v. Baden)*, 796 F.2d 1165, 1172 (9th Cir. 1986) (affirming directed verdict), *cert. denied*, 108 S. Ct. 450 (1987). The district court properly granted summary judgment on this ground.

B

[3] The district court relied on its finding that Dworkin had failed to introduce evidence of *New York Times* malice as an alternate ground for summary judgment. Initially, it might seem that inquiring into the existence of *New York Times* malice is inconsistent with the conclusion that the Features contain no statements of fact. As the Supreme Court has noted, "[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974)[4]; *see Falwell*, 108 S. Ct. at 883 (White, J., concurring in the judgment). The apparent inconsistency can be reconciled where the speaker intends his statements as outrageous parodies or caricatures expressing an opinion rather than making factual assertions. In that case, as counsel

[4]*Letter Carriers* was primarily based not on the first amendment, but on federal labor statutes. *See id.* at 283 n.15. Nevertheless, the case explicitly applied first amendment principles. *Gertz* contains the leading expression in an exclusive first amendment context of the requirement that the statement must be of untrue fact:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Id. 418 U.S. at 339-40.

for Hustler points out, "there is no consciousness that [the speaker] is publishing something false, because [the speaker doesn't] think [he's] publishing a statement of fact." *New York Times* malice exists only if the defendant knowingly falsifies or "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see Gertz*, 418 U.S. at 335 n.6 (*New York Times* requires "subjective awareness of probable falsity"). Therefore, if a speaker knowingly publishes a literally untrue statement without holding the statement out as true, he may still lack subjective knowledge or recklessness as to the falsification of a statement of fact required by *New York Times*.

[4] Turning to the present case, we agree with the district court's conclusion that "Dworkin persists in using the term 'malice' in its colloquial sense of 'spite' or 'ill-will.' " Even on appeal, the difference between *New York Times* malice and the lay meaning of the word "malice" eludes appellants. The Supreme Court has explicitly held that when a plaintiff must prove *New York Times* malice, "impos[ing] liability on the basis of the defendant's hatred, spite, ill will, or desire to injure [is] 'clearly impermissible.' '[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.' " *Letter Carriers*, 418 U.S. at 281 (citations omitted). Because of Dworkin's faulty notion of *New York Times* malice, appellants have pointed to no evidence probative of *New York Times* malice, and there exists no genuine issue of fact.

Appellants' suggestion that the malice issue cannot be disposed on summary judgment lacks merit. The Supreme Court has held that the lack of *New York Times* malice is a proper ground for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

As a fallback position, Dworkin argues that "[t]he three publications about Andrea Dworkin make absolutely no comment on an issue of public concern." Dworkin then observes

that the Supreme Court has not decided the degree of first amendment protection afforded to a defamatory statement of fact about a public figure but "involv[ing] no issue of public concern." Dworkin concludes that "defamatory comments made [about a public figure but] on issues not of public concern" disseminated in a "pornographic" publication should receive no first amendment protection. We disagree with both the characterization of the Features as "not of public concern" and the conclusion that public figure/private concern speech is completely unprotected by the first amendment.

I

Dworkin's own characterization of the Features belies the contention that they are "not of public concern." Dworkin is an influential and successful antipornography activist. Her activities have taken the form of advocacy and more direct political involvement. Dworkin participated in the drafting of the Indianapolis antipornography ordinance that was enacted and struck down as unconstitutional. *See generally Hudnut*, 771 F.2d 323. Dworkin herself points out: "Flynt also admitted that the work done on the Minneapolis Ordinance by Andrea Dworkin caused a great deal of problems for the pornography industry. Part of the reason that he attacked Andrea Dworkin was as a part of his campaign to fight the Minneapolis Ordinance against pornography."

As we noted above, the conflict about pornography is a matter of public concern, and the Features are a part of that conflict. The Features are attacks, ad hominem, to be sure, against an advocate of a political, social, and moral viewpoint contrary to Hustler's. They were uttered in the context of an ongoing political debate in which Dworkin was an active participant in efforts to outlaw the industry of which Hustler is a part. They seek to belittle Dworkin's viewpoint by vilifying its advocate. We have recently considered similar remarks contained in Hustler, and had no difficulty concluding "that

there is a heated and spirited debate on pornography of which this [Hustler] article is a part, and in which epithets, fiery rhetoric and hyperbole are expected." *Ault*, 860 F.2d at 881; *accord Leidholdt*, 860 F.2d at 894.

[5] To the same effect is the Supreme Court's recent decision in *Falwell*. In *Falwell*, Hustler had run a bogus "interview" with the prominent minister Falwell, in which Falwell had supposedly admitted to drunken incestuous intercourse with his mother in an outhouse, and which portrayed Falwell as an immoral hypocrite who preaches only when he is drunk. 108 S. Ct. at 878. The Court observed that vehement, and even "outrageous," criticism of public figures is a component of the "robust political debate encouraged by the First Amendment." *Id.* at 879. The Court then adopted the decisions of the courts below that the supposed interview contained no assertions of fact and concluded that the first amendment therefore prevented Falwell from recovering on his claim for intentional infliction of emotional distress as well as his claim for libel. 108 S. Ct. at 882-83.

[6] *Fallwell* makes clear that the Features do address matters of public concern. Accordingly, Dworkin's claims in this case are squarely within the rule of *New York Times*, which requires her to establish a question of fact as to malice on the part of Hustler. As we indicated above, this she has failed to do.

2

We also find fault with the second prong of Dworkin's argument that the first amendment does not protect appellees from defamation liability for publishing or distributing the Features. The Supreme Court has considered two distinctions in determining the extent to which the first amendment protects allegedly defamatory speech. These distinctions are (1) whether the allegedly defamed plaintiff is a public (or official) figure or is instead a private figure, and (2) whether the sub-

ject matter of the allegedly defamatory speech is a matter of public or of private concern.

[7] A large body of case law establishes that the first amendment prohibits defamation liability[5] for otherwise protected speech, unless the speech contains a defamatory statement of untrue fact. *Letter Carriers*, 418 U.S. at 284. In *New York Times*, the Supreme Court held that in order to be actionable in a public figure/public concern case, the false statement of fact must have been uttered either with knowledge of its falsity or with reckless disregard of whether it was false or not. 376 U.S. at 279-80. The Court addressed a private figure/public concern claim in *Gertz*, holding that in such a case the first amendment prevents the imposition of liability "without fault," *id.* at 347, and also requires proof of *New York Times* malice before the plaintiff may recover presumed or punitive damages. *Id.* at 349. More recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a majority of the Justices opined that defamatory statements of untrue fact contained in private figure/private concern speech are unprotected by the first amendment.

[8] Dworkin asks us to extend *Greenmoss* to public figure/private concern cases. This request rests on analytically faulty reasoning. Justice Powell's three-Justice opinion in *Greenmoss* framed the issue in terms of whether *Gertz*, a private figure/public concern case, should apply to a private figure/private concern statement. 472 U.S. at 757. Like *Gertz*, Justice Powell's *Greenmoss* opinion emphasized the differences between public and private figures. *Id.* at 756. Similarly, Justice White's opinion concurring in the judgment also

[5]Especially after *Falwell*, it seems likely that the requirement that the speech contain a false statement of fact applies not just to defamation claims, but to all claims seeking to impose civil liability for speech not otherwise outside the protection of the first amendment. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974) (the first amendment limits the state's ability to impose "civil liability" for speech).

emphasized the nature of the plaintiff rather than the subject matter of the speech. *Id.* at 772 (White, J., concurring in the judgment). Only Chief Justice Burger emphasized the distinction between matters of public and private concern, and even he framed the question as "whether *Gertz* applies." *Id.* at 764 (Burger, C.J., concurring in the judgment).

Because the Features were about a public figure, the point of departure in this case is not *Gertz*, but *New York Times*; *Greenmoss* is simply inapposite. The shield provided by *New York Times* wards the Features, and provides much heftier safeguards than the *Gertz* standards the Supreme Court rejected in *Greenmoss*. Viewing the case in this light reveals another fundamental problem with appellants' logic; we doubt that it is possible to have speech about a public figure but not of public concern.

In *Gertz*, the Supreme Court stated that a plaintiff may become a public figure through "either of two alternative [means]."

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. at 351.

Thus, Dworkin may be one of two types of public figures. First, she could be "a public personality for all aspects of [her] life." *Id.* at 352. If this were so, all speech about her would be of public concern. Second, she could be a public figure to an extent defined by "the nature and extent of [her] participation in the particular controversy giving rise to the defamation."

Id. "Public controversies" within the meaning of *Gertz* are distinct from "controversies of interest to the public." *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). An individual is a public figure not through involvement in mere "controversies of interest to the public," but only through participation in "public controversies" — i.e., matters of public concern. Therefore, if Dworkin is a public figure in this case it is only because the Features were of public concern.

Finally, even if we assume that Dworkin attacks statements in the Features that are not of public concern, *Falwell* indicates that they receive full-fledged *New York Times* protection. *Falwell* forecloses Dworkin's argument on the facts of this case.

III

[9] Although they have taken a variety of inconsistent positions through the course of this litigation, at oral argument counsel for Dworkin conceded that New York law governed her state law claims, including her invasion of privacy claims. In New York, Civil Rights Law § 51 is the exclusive private cause of action for invasion of privacy. Other than as provided in the Civil Rights Law, the courts of New York have "refus[ed] to countenance an action for invasion of privacy." *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 435, 449 N.Y.S.2d 941, 943, 434 N.E.2d 1319, 1321 (1982). The statute was "drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more," *id.*, 449 N.Y.S.2d at 943, 434 N.E.2d at 1321, and has been narrowly construed by the courts of New York to protect only those commercial uses. *Id.* at 436, 449 N.Y.S.2d at 944, 434 N.E.2d at 1322. *Accord, e.g., Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 139 N.Y.S.2d 735, 739, 480 N.E.2d 349, 353 (1985) (section 51 "grant[s] protection only to the extent of affording a remedy for commercial exploitation of an individual's name, portrait or picture, without written consent"); *see Leidholdt*, 860 F.2d at 895.

By its terms, section 51 prohibits appropriation only "for advertising purposes or for the purposes of trade." N.Y. Civil Rights Law § 51. Appellants cite a lower court case noting that "[t]he term 'purposes of trade' is 'not susceptible to ready definition.'" *Marcinkus v. NAL Pub. Inc.*, 522 N.Y.S.2d 1009, 1011 (N.Y. Sup. Ct. 1987). Contrary to the position taken by appellants, however, that the defendant may have included the Features "solely or primarily to increase the circulation of its magazine and therefore its profits" does not mean that the defendant[s] ha[ve] used [Dworkin's identity] for trade purposes within the meaning of the statute." *Stephano v. News Group Pubs., Inc.*, 64 N.Y.2d 174, 179, 485 N.Y.S.2d 220, 225, 474 N.E.2d 580, 585 (1984). Instead, it seems that two distinct types of claims fit within the "purposes of trade" requirement of New York law.

The first type of claim is essentially identical to the common law "right of publicity," which protects proprietary interests in a manner analogous to copyright or patent law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977). New York has recently acknowledged this branch of section 51 in *Stephano*. There, the New York Court of Appeals noted that section 51 applies "in cases where the plaintiff generally seeks publicity, or uses his name, portrait, or picture, for commercial purposes." 64 N.Y.2d at 179, 485 N.Y.S.2d at 225, 474 N.E.2d at 585. *Zacchini*, which the *Stephano* court cited with approval, explained:

> the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. . . . [T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors . . . . [I]n "right of publicity" cases the only question is who gets to do the publishing. An entertainer . . . usually has no objection to

> the widespread publication of his act as long as he gets the commercial benefit of such publication.

433 U.S. at 573.

The second branch of section 51 is a trademark analogy that has been identified by the lower courts of New York. *See also Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967), *vacating* 18 N.Y. 2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543, 545 (1966) (possibly applying this line of reasoning). This type of claim permits recovery for a use of the plaintiff's identity in a manner that "conveys or reasonably suggests the subject's endorsement of the publication in question." *Velez v. VV Pub. Corp.*, 135 A.D.2d 47, 50, 524 N.Y.S.2d 186, 189 (N.Y. App. Div. 1988) (citing *Booth v. Curtis Pub. Co.*, 15 A.D.2d 343, 223 N.Y.S.2d 737 (N.Y. App. Div.), *aff'd*, 11 A.D.2d 907, 228 N.Y.S.2d 468; 182 N.E.2d 812 (1962)). *Marcinkus*, heavily relied upon by appellants, was this sort of case.

[10] Dworkin does not and cannot plausibly argue that the cartoons constitute an appropriation by Hustler of the commercial benefit of a performance in which Dworkin has a proprietary interest or that the cartoons indicate her endorsement of Hustler. Therefore, we hold that Dworkin can not recover on any privacy theory recognized by New York.[6] *Accord Leidholdt*, 860 F.2d at 895 (Hustler's use of plaintiff's photograph was not "exclusively for Hustler's commercial gain," and plaintiff therefore failed to state a claim under New York Civil Rights Law section 51).

IV

[11] We next turn to appellants' claim of an implied private

[6]Dworkin also asserts a true light privacy, or "public disclosure of private facts," theory. This claims fails under *Leidholdt*, in which we observed that New York does not permit true light privacy claims. 860 F.2d at 895.

cause of action based on a Wyoming criminal obscenity statute. Normally, we would address the statutory question of whether appellants may assert such a cause of action before turning to the constitutional question of whether the first amendment permits a finding that the Features are obscene. We need not do so in this case because our earlier holdings have effectively answered that question.

[12] Under the three-part test for obscenity of *Miller v. California*, 413 U.S. 15 (1973), a publication may be obscene only if it appeals to the prurient interest, it depicts specifically defined sexual conduct in a patently offensive way, and, taken as a whole, it "lacks serious literary, artistic, political, or scientific value." *Id.* at 24. Because the Features expressed opinions about matters of public concern, they did not lack "serious literary, artistic, political, or scientific value." It follows that they are not obscene. *Cf. Falwell*, 108 S. Ct. at 882 ("the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles").

[13] Here, we also decline the invitation of appellants and amici to create a new category of expressive activity — nonobscene "pornography" — that is "not entitled to constitutional protection." Appellants and amici press this point by citing a number of cases holding that certain utterances are unprotected by the first amendment. In conjunction with these citations, they point out the harms that they believe pornography causes, equate the expressive activity of pornographers with "rape, batter[y], torture, brutaliz[ation] and sometimes kill[ing]" allegedly perpetrated by pornographers, and remark that pornographic expression is unworthy of protection. The view urged by appellants and amici runs contrary to fundamental first amendment principles, and we refuse to adopt it.

The *Miller* element requiring obscenity to lack "serious literary, artistic, political, or scientific value" focuses on the

"worth" of allegedly obscene speech to determine whether it is protected by the first amendment.[7] By asking us to apply a less restrictive standard than *Miller*, appellants and amici ask us to permit the suppression of speech that *does* possess "serious literary, artistic, political, or scientific value." To do so would require us to flout the fundamental principle that the first amendment is designed to *foster* robust public debate on such matters. We refuse to do so.

By citing such cases as *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942), and *Near v. Minnesota*, 283 U.S. 697 (1931), appellants and amici also seek to invoke the doctrines identifying categories of expression that may be regulated because of their tendency to cause others to engage in undesirable acts. As we noted in *Ault* and *Leidholdt*, Hustler's speech is not actionable simply because it is "base and malignant." *Leidholdt*, 860 F.2d at 894; *Ault*, 860 F.2d at 881. Numerous cases establish that speech may not be suppressed simply because it is offensive. *E.g.*, *Falwell*, 108 S. Ct. 876; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 & n.6 (1975) (absent captive audience, speech may not be regulated simply because it is offensive); *Cohen*, 403 U.S. at 16 ("Fuck the Draft" is protected); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (per curiam) ("We'll take the fucking street later," or "We'll take the fucking street again" is protected); *see Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (racist advocacy by Ku Klux Klan); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (Nazi march in Jewish community), *cert. denied*,

[7] In *Roth v. United States*, 354 U.S. 476 (1957), the Court observed that obscenity is "utterly without redeeming social importance." *Id.* at 484. The plurality in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966), incorporated this element into the definition of obscenity. *Id.* at 419. In *Miller*, a majority of the Court adopted this approach, albeit in a modified form, and included as a part of the definition of obscenity the requirement that "the work, taken as a whole, [must] lack[ ] serious literary, artistic, political, or scientific value." 413 U.S. at 24. The focus on "social importance" or "value" indicates a concern with the "worth" of the speech.

439 U.S. 916 (1978). Instead, a large body of case law sharply limits the reach of these categories by requiring that the speech be directed toward and likely to incite imminent unlawful action. *See, e.g., Hess,* 414 U.S. at 108; *Brandenburg,* 395 U.S. at 447. Appellants introduced no material evidence that Hustler is likely to cause imminent unlawful action[8] or, perhaps even more importantly, that Hustler is *directed* to producing or inciting such action. Accordingly, we reject this argument, as well.

V

As described by appellants, their civil rights claims assert that "the persistent attacks on Andrea Dworkin and other feminist anti-pornography leaders, such as Gloria Steinem, intimidated [appellants] and chilled their exercise of their own free speech rights. The crux of these claims was that these women were afraid to exercise their rights to speak out against pornography because if they did so they risked such vile and cruel portrayals of themselves as were levied against Andrea Dworkin and Gloria Steinem." In effect, appellants argue that Hustler and Flynt are subject to first amendment constraints in the same manner and to the same extent that state actors are.

Appellants' argument in support of this claim is virtually incoherent. It consists of little more than the unsupported assertion that a private actor violates the first amendment if he utters unprotected speech that has an adverse effect on the

[8]As we have noted above, a heated public debate currently rages about pornography. Some partisans in that debate contend that pornographic publications such as Hustler are likely to cause imminent unlawful action. Other partisans claim, with equal vigor, that pornographic publications do no such thing. At best, the scientific evidence concerning the causal relationship between pornographic materials and violent actions is ambiguous and unvalidated. Such equivocal evidence is insufficient to establish the "clear and present danger" required in order for any of the exceptions to general first amendment principles to apply.

expressive activity of another. Nevertheless, we consider their argument as best we can.

Initially, we note that the claim of Moree and Fouts amounts to a group libel claim. The Supreme Court opinion in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), is generally regarded as providing some support for group libel claims. The cases decided since *Beauharnais*, however, have substantially undercut this support. To the extent that *Beauharnais* can be read as endorsing group libel claims, it has been so weakened by subsequent cases such as *New York Times* that the Seventh Circuit has stated that these cases "had so washed away the foundations of *Beauharnais* that it cannot be considered authoritative." *Hudnut*, 771 F.2d at 331 n.3; *see Collin*, 578 F.2d at 1205 (citing cases and expressing "doubt . . . that *Beauharnais* remains good law at all after the constitutional libel cases"). We agree with the Seventh Circuit that the permissibility of group libel claims is highly questionable at best. Accordingly, we share the district court's skepticism that Moree and Fouts were properly joined in this action, *see* 611 F.2d at 785.

Nevertheless, we affirm the district court's dismissal on another ground. The district court dismissed Dworkin's civil rights claim because "*Hustler* Magazine and Larry Flynt are simply not state actors, and a plaintiff must plead state action in order to pursue a constitutional claim." 634 F. Supp. at 729. We agree with the district court, and affirm the dismissal of both Dworkin's claim and Moree and Fouts' claim on this ground. Appellants give no persuasive reason for taking the drastic step of abandoning the well-established state action doctrine. Rather than suppressing certain private viewpoints by treating them as if they were governmental, the first amendment requires other ideas to compete with those viewpoints, *e.g.*, *Gertz*, 418 U.S. at 340, in "uninhibited, robust, and wide-open" public debate, *New York Times*, 376 U.S. at 270.

VI

Appellees have requested double costs and attorneys' fees pursuant to Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1912. We have "discretion to award attorney's fees and costs as a sanction against a frivolous appeal. An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *DeWitt v. Western Pac. R.R. Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983).

We denied a similar request made by Hustler in *Leidholdt*, 860 F.2d at 895-86. Consequently, sanctions would be inappropriate in this appeal, which was filed under circumstances substantially similar to those of *Leidholdt*. However, the arguments made in this case have now been rejected by this court in *Liedholdt*, *Ault*, and in this case. Should litigants raise similar contentions in subsequent cases, the courts hearing those cases may consider in the first instance whether sanctions are appropriate.

VII

The judgment of the district court is **AFFIRMED**. The request for double costs and attorneys' fees on appeal is **DENIED**.

APPENDIX B

"You remind me so much of Andrea Dworkin, Edna. It's a dog-eat-dog world."

APPENDIX C

Hot Copy

We predict big success and bulging profits for *Rod & Trick*, a new magazine devoted to the world's oldest profession. Besides such features as "Margo St. James: Else Whore's Whore" and a look at paraplegic hookers, it boasts a can't-miss promotional campaign. The first issue is delivered personally by Subscription Fulfillment Manager, Lucy "88DD" Clitterhouse.

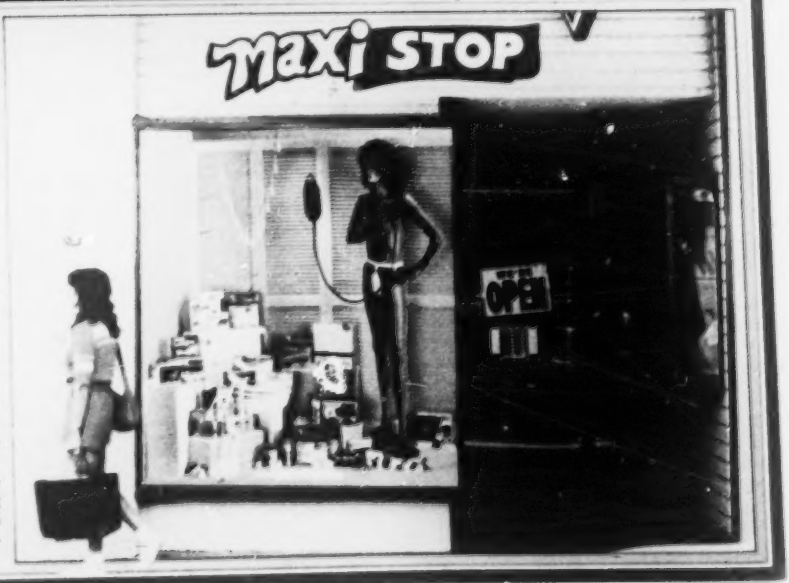
Porn From the Past

We don't believe it for a minute, but one of our editors swears that this woman in the throes of ecstasy is the mother of radical feminist Andrea Dworkin. He's also positive that the guy performing "Bababoo" on Mama's drums while keeping time with his stick is Robby "the Rock" Ricardo—a distant relative of *I Love Lucy*'s Ricky. Understandably, we gave that editor the day off to watch *Lenore Is to Bounce* reruns. If you have some great old porn that's hard to beat, mail it right away to "Porn From the Past," HUSTLER, 2029 Century Park East, Suite 3800, Los Angeles, CA 90067-3054.

Go With the Flow

Is your old lady confused by all the ads on TV? Not sure whether to douche with vinegar or Pepto-Bismol? Unable to find the right pad for her moonbikes? Why not clue her in to the convenience shop for all her feminine needs: Maxi Stop. This place has everything from the finest silk-lined protection to burlap disposables, in sizes ranging from petite pixie to extra-super jumbo.

Need something that expresses your lady's individual personality? Maxi's douche boutique features every aroma from mint to tuna. So when your woman's "friend" comes for a visit, send her to the place that takes the drag out of being on the rag: Maxi Stop, the *definitive* feminine-hygiene store—period.



PROOF OF SERVICE BY MAIL

State of Wyoming

ss.

County of Teton

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Teton, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 265 W. Pearl Street, Jackson, Wyoming 83001; that on April 21, 1989, I served the within *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Teton County, Wyoming, addressed as follows:

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Supreme Court
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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 19, 1989, at Teton County, Wyoming.

Original Signed By
GARY L. SHOCKEY

Gary L. Shockey